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No. 92-8579

In The

Supreme Court of the United States

October Term, 1993

CHARLES K. ELDER,

Petitioner,

v.

R.D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS, Individually, And In Their Official Capacity As Police Officers For The Ada County Sheriff's Office; VAUGHN KILLEEN As Sheriff Of Ada County; And The COUNTY OF ADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in 1987 there was clearly established law of which an arresting officer should have known that a law enforcement officer, with probable cause and a certified arrest warrant from another state, needed an arrest warrant issued in his home state to surveil a personal residence with the intent of arresting a suspect outside the residence?

2. Was the Court of Appeals correct in placing upon the plaintiff in a civil rights action the burden of showing clearly established law when responding to a government official's motion for summary judgment?

3. What standard of review is to be applied by a Court of Appeals in reviewing a district court's grant of qualified immunity?

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STATEMENT OF THE CASE

A.

STATEMENT OF FACTS

After receiving an informant's tip that Petitioner Charles K. Elder ("Elder") was residing in Boise, Idaho, having fled the State of Florida because of two pending felony charges (aggravated battery and receiving stolen property), Respondent R. D. Holloway ("Holloway") attempted to arrest him on April 27, 1987. The information provided to Holloway included that Elder was very dangerous, had beat two individuals with pool cues in Florida, was in possession of firearms, and would "shoot it out with law enforcement" if an attempt was made to arrest him. R. 27, Ex. 1.

On the morning of April 27, 1987, Holloway received certified copies of the felony warrants from the State of Florida. An attempt was then made to arrest Elder outside at his job site but Elder had been informed by his employer that law enforcement was looking for him. JA 2-3. Holloway and other officers then proceeded to Elder's brother's house, where Elder was apparently residing, with the intent to surveil the residence and arrest Elder once he exited. JA 3. The surveillance was discovered by Elder's brother when he left the home on horseback. Elder's brother advised Holloway that Elder had access to numerous guns in the house. R. 27 (Deposition of R. D. Holloway, pp. 94, 99-100). Elder's brother assisted Holloway by talking on the telephone with Elder. Holloway overheard Elder's brother tell him: "There are dozens of cops out here with shotguns and rifles, and you

can't shoot it out with them." "You can't win." R. 27 (Deposition of R. D. Holloway, p. 108).

During the course of the telephone conversations between Elder and his brother Holloway learned that Elder may have had an epileptic seizure. Holloway instructed Elder to exit the residence on his hands and knees to avoid injury from falling. Elder exited the residence on foot, had a seizure on the front stoop, fell and was injured. He was then arrested.

B.
DECISIONS BELOW

The district court on cross motions for summary judgment granted Holloway's motion on qualified immunity. The court denied plaintiff's motion for partial summary judgment which sought to have the court declare that Elder's warrantless arrest was unconstitutional. Holloway had similarly moved for summary judgment on the constitutionality of the arrest on numerous grounds, including a warrant was not required; in the event it was required, exigent circumstances existed. The district court held that there were genuine issues of material fact precluding summary judgment for either party on the constitutionality of the arrest.

Both in asserting that the arrest was unconstitutional and in opposing Holloway's motion on qualified immunity, Elder advanced a "constructive entry" theory. Based upon state court decisions from courts outside of Idaho, Elder argued that he had constructively been arrested inside the house. The district court held that the case law

was not clearly established as to whether under the circumstances a reasonable officer would have known that a warrant was required. JA 18.

Elder appealed only the qualified immunity issue to the Ninth Circuit. He relied upon the same case authorities cited to the district court. During the course of oral argument the panel identified a case that was arguably on point. Elder's counsel sought to distinguish the case.

The panel affirmed the district court. JA 24. The panel then issued an Amended Opinion which again affirmed the district court. In the Amended Opinion the panel did not reach the merits of the qualified immunity issue except to say that the language in the case which it had located, and which Elder attempted to distinguish, was dicta, and that the actual holding of the case was not entirely advantageous to Elder. JA 44. The panel, relying upon Supreme Court and Ninth Circuit precedent held Elder had the burden of showing clearly established law at the district court. It further held it would affirm because Elder failed to advance clearly established law at the district court, attempted to distinguish the one case the panel had located, and the case the panel located did not clarify whether there was clearly established law. JA 44-45.

Elder requested a rehearing and suggested *en banc* consideration which was denied. JA 46.

SUMMARY OF THE ARGUMENT

The question presented by Elder begs the issue actually presented by this case: whether a reasonable officer could have believed Elder's arrest to be lawful, in light of clearly established law and the information the arresting officer possessed. The Court has recently held that the first inquiry in qualified immunity analysis is whether there has been a showing of a violation of a constitutional right that was clearly established at the time of the arrest. Instead of addressing the merits of the qualified immunity issue, Elder requests the Court to review the Ninth Circuit panel's refusal to consider one case on appeal. This Court need not reach that issue because Elder's arrest did not violate clearly established constitutional rights of which a reasonable officer should have been aware.

Only if Elder overcomes the first inquiry need the Court consider the panel decision. If the Court does address the panel decision, the decision should be affirmed because it is consistent with the Court's qualified immunity decisions and supports the policies underlying qualified immunity. The panel held: (1) Elder failed to meet his burden of showing a violation of a constitutional right; and (2) under the circumstances, the panel would not consider a case Elder had failed either to cite to the district court or to rely upon in the Ninth Circuit once the case was brought to his attention.

The panel decision with respect to Elder's burden of showing a violation of a constitutional right is consistent with this Court's recent qualified immunity decisions. In addition, the vast majority of Circuit Courts of Appeals

have specifically placed the burden of proof of establishing a clear constitutional right upon the plaintiff. In light of the plaintiff's burden, the explicit recognition in qualified immunity cases of a desire for early resolution of the qualified immunity issue, and summary judgment standards, a plaintiff must meet the burden by presenting clearly established law *at the time* the question arises in the district court.

The panel decision to disregard one case neither cited to the district court nor relied upon by Elder once brought to his attention is within the panel's discretion. The panel recognized the important factors identified above, and extended and reconciled them in deciding not to consider the impact one case had on the clearly established law question. That decision was within its discretion.

Elder's reading of the panel decision on that point is grossly over-broad. The panel did not hold that in all circumstances it would disregard authority not cited to the district court. Rather, it held under the circumstances of this case, where the case was not cited, where the case was located by the panel and strategically ignored by plaintiff, and where the case was only arguably on point, it would not be considered. In criticizing the panel opinion, Elder argues that the panel had no discretion to disregard the case. That criticism is incorrect and ignores an appellate court's discretion.

Moreover, the panel decision, even if read more broadly, is the logical extension of the burden of proof being placed upon the plaintiff to show clearly established law. There is precedent supporting deferential

review of the district court's decision. And, public policy considerations underlying qualified immunity support deferential review.

ARGUMENT

I.

HOLLOWAY IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE A REASONABLE OFFICER COULD HAVE BELIEVED ELDER'S ARREST TO BE LAWFUL, IN LIGHT OF CLEARLY ESTABLISHED LAW AND THE INFORMATION HOLLOWAY POSSESSED.

A.

The Court should determine whether Holloway is entitled to qualified immunity before even considering the panel decision.

In *Siegert v. Gilley*, 114 L.Ed.2d 277 (1991) the Court granted certiorari to address the appropriate "analytical structure" when qualified immunity is raised by a defendant. The first inquiry, according to Chief Justice Rehnquist, is a determination of whether the plaintiff asserts the violation of a clearly established right. *Id.* at 286. Thus, in affirming a dismissal of the plaintiff's complaint for failure to allege the violation of a clearly established right, the Court did not reach the procedural issue – a heightened pleading standard – which the Court of Appeals had applied.

Even before announcing the clarified analytical structure in *Siegert*, the Court had taken the same approach in *Procunier v. Navarette*, 434 U.S. 555 (1978). In *Procunier*, the

district court had granted summary judgment to defendant prison officials on a prisoner's claim that he had a constitutional protection for his outgoing prison mail. The Court of Appeals reversed summary judgment on three separate grounds. This Court granted certiorari on one of the grounds – whether alleging negligent violation of a constitutional right is sufficient for purposes of 42 U.S.C. § 1983. The Court did not, however, reach that issue. Instead, the Court went directly to the qualified immunity issue of whether there were clearly established rights protecting prisoners' outgoing mail, *Id.* at 565, and specifically acknowledged it did not address the standard of conduct necessary to assert a § 1983 claim. *Id.* at 566 n.14.[1]

Since a resolution of the qualified immunity issue in favor of Holloway is dispositive, the Court need not consider the "procedural issues" (Brief for the American Civil Liberties Union on Amicus Curiae in Support of Petitioner, p. 7) raised by the panel decision. In keeping with *Siegert's* analytical structure and *Procunier's* earlier analysis, the Court should first address the issue of whether Elder has stated the violation of a clearly established constitutional right.

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[1] *Procunier* also demonstrates that the merits of the qualified immunity issue is a subsidiary question fairly included within the question identified by petitioner. Sup. Ct. R. 14.1(a); *United States National Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173 (1993).

B.

Supreme Court precedent establishes that Holloway has qualified immunity.

1. Qualified Immunity in the Supreme Court.

In a long line of cases, beginning with *Pierson v. Ray*, 386 U.S. 547 (1967) the Court has recognized and applied qualified immunity to law enforcement officers who have allegedly violated Fourth Amendment protections. *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987); and *Hunter v. Bryant*, 116 L.Ed.2d 589 (1991). In so doing, the Court recognized in *Davis v. Scherer*, 468 U.S. 183, 196 (1984):

> . . . [P]olice officers . . . who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. Those officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." (citation omitted) In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred would be futile or constitute virtual abdication of office." (citation omitted)

Law enforcement officers must make difficult decisions in the field on a daily basis. *Cf. Scheuer v. Rhodes*, 416 U.S. 232, 246-247 (1974). The Fourth Amendment presents some of the most difficult decisions officers must face. *Anderson, supra*, at 644. Often those decisions place officers in situations where a choice must be made

between being charged with dereliction of duty if they do not act or suit under § 1983 if they do. A "policeman's lot is not [supposed to be] so unhappy." *Pierson, supra*, at 555.

But, qualified immunity is intended to protect ". . . all but the plainly incompetent or those who knowingly violate the law." *Malley, supra*, at 341. This is so because at the heart of immunity for law enforcement officers is the public interest in enforcing laws and protecting the public, *Scheuer, supra*, at 241, and the related danger that the threat of personal liability would deter officers from protecting the public interest. *Id.* at 240.

With these important policy considerations in mind, the Court has established a qualified immunity standard that is intended to protect the public from officers who with objective knowledge violate clearly established constitutional or statutory rights. The "modern" seminal cases in defining the standard of qualified immunity for law enforcement officers are *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson, supra*. In *Harlow*, the objective/subjective test was dropped in favor of an objective test which is intended to promote early dismissal of insubstantial claims. *Id.* at 818.[2] That goal explicitly recognized the public policy identified in *Scheuer* of not wanting to deter officers in performing their functions. *Id.* at 816 and 818.

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[2] More will be said about this important public policy consideration in Part II of this brief.

The qualified immunity standard enunciated in *Harlow* is that government officials are immune if their conduct does not violate clearly established constitutional or statutory rights:

> . . . Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

While *Harlow* established the objective standard, *Anderson* defined it. In *Anderson* an FBI agent conducted a warrantless search of a home on the mistaken belief that a suspected bank robber may be present. When the home owner sued in a *Bivens*[3] action alleging violation of the Fourth Amendment, the district court granted the agents' motion for summary judgment holding that the search was lawful, the agents had probable cause to search, and the failure to obtain a warrant was justified by exigent circumstances. The Court of Appeals reversed on the basis that there were genuine issues of material fact precluding summary judgment on the legality of the search. In addition, the Court of Appeals reversed summary judgment on qualified immunity on the basis that the home-owner's Fourth Amendment rights were clearly defined.

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[3] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

This Court reversed and remanded the qualified immunity issue. In so doing the Court identified the Court of Appeals' error on the qualified immunity issue as too generally defining the relevant legal rules to be applied in assessing whether a clearly established right had been violated. The Court of Appeals had identified the general Fourth Amendment right to be secure in one's home as the clearly established right. That inquiry was over-broad. The inquiry should have been more particularized: ". . . the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. The Court of Appeals' error was it did not consider the FBI agent's argument that the law was not clearly established under the circumstances within which he was confronted at the time. *Id.* at 640-641.

Importantly, the Court recognized, as it had in a number of earlier cases, that a law enforcement officer has qualified immunity if he reasonably – but mistakenly – concludes there is probable cause or exigent circumstances. *Id.* at 641. Qualified immunity is not determined by whether a constitutional violation occurred, but whether the officer under the circumstances presented – the information he possesses – "could have believed" his conduct to be lawful in light of clearly established law. *Id.* at 641. Indeed, qualified immunity analysis assumes a constitutional violation, but immunizes the government official from damages. *Cf. Wyatt v. Cole*, 118 L.Ed.2d 504, 518-519 (1992) (Kennedy, J. concurring).

With that background the question of whether Holloway is entitled to qualified immunity, as the district court held and the Court of Appeals affirmed, can be assessed.

The inquiry is whether a reasonable officer would have believed Elder's arrest to be lawful (a) based upon the information Holloway had and (b) in light of clearly established law. *Anderson, supra,* at 641.

2. The information available to the arresting officer.

The analysis begins with the information Holloway had at the time of Elder's arrest. Holloway had an informant's tip made to a city police officer on April 21, 1987. Holloway was able to verify the information in the tip. The informant advised that Elder was wanted in Florida on felony charges of aggravated battery and dealing in stolen property; he was living with his brother in Boise, Idaho; he had possession and access to guns; he had threatened to shoot it out with police if they attempted to arrest him; and he was extremely dangerous.

Acting on that information, Holloway learned that Elder was employed by a local tree cutting service and that he worked outside at that employment. After having made contact with Florida authorities earlier, Holloway received certified copies of the Florida warrants of arrest on the morning of April 27, 1987. He then contacted Elder's employer and advised that an attempt to arrest Elder at the job site would be made. Unfortunately, the employer informed Elder of his potential arrest. He and his brother left the job site and went to the brother's home.

When Holloway arrived at the job site he was informed that Elder had left and that he had a gun in his

possession. Holloway then went to Elder's brother's home to surveil the residence. Holloway did not want to approach the house because of the information he had that Elder was dangerous and would "shoot it out" with law enforcement. Thus, the residence was to be surveiled until Elder left and could be arrested in an open place with less risk to innocent persons.

Elder's brother, who had been at the residence, left on horseback and discovered the officers' presence. He told the officers that Elder was in the house, had access to numerous firearms, and would resist arrest. Holloway attempted to reach Elder by telephone to see if he would surrender, but he did not answer the phone. Only after Elder's brother, by use of a loudspeaker, made contact with Elder did any communication occur. Elder reported he had had an epileptic seizure. Holloway asked Elder to crawl outside to avoid physical injury in the event of another seizure. Elder, contrary to Holloway's instructions, exited the house on foot, had a seizure on the stoop, landed on his head and was injured. He was then arrested.

3. Legal rules governing the arrest.

As noted above, the second inquiry in qualified immunity analysis is whether the legal rules involved were clearly established. The specific legal rules governing Elder's arrest under the circumstances were not clearly established and Holloway is entitled to qualified immunity.

At either end of the broad Fourth Amendment spectrum are two clearly established principles: (1) a warrant is necessary to arrest an individual in a personal residence absent exigent circumstances, *Payton v. New York*, 445 U.S. 573 (1980), and (2) a warrant is not necessary to arrest in a public place where there is probable cause, *United States v. Watson*, 423 U.S. 411 (1976). With those principles neither Elder nor Holloway disagree. But, the legal principles become less clear toward the middle of the Fourth Amendment spectrum.[4]

Elder's arrest falls in the middle of the spectrum where the legal rules are not clearly established. Holloway did not enter the house to arrest Elder. He physically placed Elder under arrest outside the house after Elder exited. There is no dispute Holloway had probable cause to arrest – the only issue is whether a warrant was necessary under the circumstances.

In an effort to establish that there was clearly established law, Elder cited state court cases to the district court. JA 12. Plaintiff did not cite any Idaho or Ninth Circuit cases to the district court. Elder claimed that the state court cases created a theory of "constructive entry." That is, even though Holloway did not physically cross the threshold of the doorway to the house, he had constructively done so by using the telephone and loudspeaker. Thus, Elder claimed a warrant was necessary because the arrest occurred in the house.

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[4] "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." *Anderson, supra*, at 644.

Apart from the obvious problem of asserting that state court decisions could put a law enforcement officer in another state on notice of legal rights, none of the cases Elder cited address the same situation which arose here. None of the cases involved the use of surveillance or the use of a telephone or bullhorn to contact someone inside a house. Each of the cases involved an officer knocking on the suspect's door and then arresting the suspect. Thus, the cases were factually distinguishable. More importantly, none of the cases could fairly be said to have put Holloway on notice that his conduct violated clearly established rights.

Further, the cases cited by Elder were not only factually distinguishable, but also they were in conflict with Ninth Circuit precedent. In *United States v. Botero*, 589 F.2d 430 (9th Cir. 1979), *cert. denied*, 441 U.S. 944 (1979), the Court of Appeals, following *United States v. Santana*, 427 U.S. 38 (1976), held that a warrant was not required where law enforcement officers went to a suspect's apartment, knocked on the door, and arrested the suspect at the doorway. Indeed, one of Elder's state court cases acknowledged that there was a split of authority as to whether a warrant was required under the circumstances; it further acknowledged that the Ninth Circuit had resolved the issue in favor of the law enforcement officers. The state court simply chose not to follow *Botero*. *State v. Morse*, 480 A.2d 183 (N.H. 1984). Elder's other cases were similarly distinguishable: they resolve the warrant requirement issue contrary to *Botero*.

Under the circumstances there was no law presented – let alone clearly established law – which would have put an objective law enforcement officer on notice that he

could not surveil Elder's residence to arrest him when he exited. Nor was there law presented which would put a reasonable officer on notice that a warrant was necessary to contact someone inside a residence by telephone or bullhorn. Certainly, use of a bullhorn or telephone is less intrusive than knocking on the front door and arresting the suspect. The latter conduct had been sanctioned by the Ninth Circuit in *Botero*. Further, since Elder was regarded as extremely dangerous it would not have been prudent for officers to approach the front door.

The "contours of the law" governing whether a warrant was necessary under the circumstances simply was not clear at the time of Elder's arrest. The district court, in determining that Holloway was entitled to qualified immunity, stated:

> . . . The defendants in this case could not have been violating plaintiff's clearly established rights when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. *There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established.* Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believe that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was

> provided for in Ada County's arrest and custody policy, that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that the officers reasonably believe that their actions were constitutional; therefore, no liability attaches to their actions.
>
> JA 18-19.

The district court was correct. The cases relied upon by Elder did not meet the *Harlow* standard. The cases did not demonstrate clearly established constitutional rights of which a reasonable person would have known.

4. The Ninth Circuit's decision in *United States v. Al-Azzawy* does not affect Holloway's qualified immunity.

As the Court is now well aware, the Court of Appeals located a Ninth Circuit case, *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1986), *cert. denied*, 476 U.S. 1144 (1986) which Elder did not offer to the district court, but which arguably should have been presented. *Al-Azzawy* does not alter the result that Holloway is entitled to qualified immunity[5] because the case would not apprise a reasonable officer that Elder's arrest may be unlawful.

In *Al-Azzawy* the Court of Appeals found a warrantless arrest under facts similar to Elder's to be lawful

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[5] Whether *Al-Azzawy* should be considered on appeal is addressed in Parts II and III of this brief. In this part of the brief, *Al-Azzawy* is addressed to demonstrate that even if it had been presented to the district court, it would not alter the result. Holloway would still be entitled to qualified immunity.

under exigent circumstances. While reaching that conclusion, the court held that surrounding the trailer, with the suspect inside, did constitute an arrest inside the trailer. But, the court went on to hold that under the circumstances – circumstances similar to this case – the arrest and subsequent search were lawful. Further, the court noted it was "a close question" whether the warrantless arrest was lawful. *Id.* at 894.

A fair reading of the entire case simply would not apprise a reasonable officer that Elder's arrest would violate Fourth Amendment rights when Al-Azzawy's arrest, under the same circumstances, did not violate such rights. At best, the officer would only know that Elder's arrest was a "close question" – one that falls in the middle of the Fourth Amendment spectrum.

This conclusion is supported by the panel decision which refers to the language in *Al-Azzawy* concerning the place of arrest as dicta, JA 34-35, 44; by Elder's counsel's attempt to distinguish the case, JA 35, n.1, 44, and by Elder's counsel's and the district court's inability to locate the case.[6] Where, as here, a lawyer and a judge were not aware of a case and a three-judge Court of Appeals calls the case arguably applicable and dicta, an officer cannot be charged with knowledge that the case constituted clearly established law.[7]

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[6] Law enforcement officers are not expected to have the same understanding of the law as trained lawyers. *Davis v. Scherer, supra,* at 197 n.13.

[7] S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* §§ 8.08 and 8.19 (3d ed. Supp. 1986). In commenting upon the panel's decision in Elder, Professor Nahmod states: "Indeed, the fact that neither counsel nor the district court timely found a Ninth Circuit precedent closely on point strongly suggested that the defendant police officer did not violate clearly settled Fourth Amendment law."

Remember, the inquiry for qualified immunity is not whether a constitutional right was violated, but whether the officer should have known he was violating a clearly established right. *Mitchell v. Forsyth,* 472 U.S. 511, 529 n.10 (1985). ". . . [W]here there is legitimate question whether an exception to the warrant requirement exists it cannot be said that a warrantless . . . [arrest] violates clearly established law." *Id.* at 536 n.12. This is especially true where, as here, the precedent upon which plaintiff relies declares the validity of the legal rule to be a "close question." *Al-Azzawy, supra,* at 894.

There is nothing about *Al-Azzawy* which would prevent a reasonable officer from believing Elder's arrest was lawful. Nor from *Al-Azzawy* could it be fairly said that Holloway should have known " . . . that the law forbade [his] conduct . . ." *Harlow, supra,* at 18. As was succinctly stated in *Anderson,* under circumstances very similar to those presented here:

> It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those

officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. *See Malley, supra,* at 344-345. The same is true of their conclusions regarding exigent circumstances.

Anderson, supra, at 641.

In the final analysis, Holloway is entitled to qualified immunity because he acted reasonably. He attempted to arrest Elder outside the house. It was only after efforts to arrest him at a job site had failed, and the officers conducting the surveillance at his brother's home were discovered, that any contact inside the home was attempted. If the officers had allowed Elder's brother to return to the house and they had left the scene, they may have been charged with dereliction of duty because Elder would have posed a threat to the public. Holloway's alternative – attempting to contact Elder in hopes that he would surrender – might, according to Elder, expose Holloway to personal liability. A law enforcement officer's lot is not supposed to be "so unhappy." *Pierson, supra,* at 555. The law was not so clearly established that Holloway would have known his actions might violate Elder's rights. The Court should affirm the Court of Appeals on the basis that Holloway has qualified immunity.

II.

WHEN THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY IS RAISED IN A CIVIL RIGHTS ACTION BY PRETRIAL MOTION, THE PLAINTIFF HAS THE BURDEN OF SHOWING THAT THE LEGAL RULES CONCERNING THE RIGHT ALLEGEDLY VIOLATED WERE CLEARLY ESTABLISHED.

The panel, in affirming summary judgment to Holloway on the qualified immunity issue, did so, in part, because Elder had not met his burden of showing that a clearly established right had been violated. Relying upon *Davis v. Scherer, supra,* and Circuit precedent dating back to 1984, the panel held Elder had the burden to establish that a clear right had been violated. JA 36 n.2. He failed to meet that burden when the only law he presented in opposition to Holloway's motion for summary judgment did not identify a clearly established right.[8]

The panel held that to meet the burden plaintiff must identify the "universe of relevant statutory or decisional law" to enable the Court to determine whether there was clearly established law. JA 39. In other words, when defendant files a motion to dismiss or motion for summary judgment, plaintiff " . . . must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or decisional law on which the court

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[8] "No case Elder identified clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises." JA 35.

can find that the constitutional right was clearly established." JA 39.

There is nothing unique or novel about placing the burden on the plaintiff to show that a clearly established constitutional right has been violated.[9] All, but one,[10] of

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[9] Neither Brief of Petitioner nor either of the *amicus curiae* briefs filed in support of Petitioner provides the Court with any authority to the contrary. In fact, none of the briefs devotes much attention to the issue. Brief of Petitioner, pp. 28-30, challenges the panel's reliance upon *Davis*. But as addressed later in n.12 of this brief, the arguments are easily refuted. The American Bar Association's brief, p. 7, calls placing the burden upon the plaintiff "jurisprudently unsound," but the brief does not address qualified immunity law. The American Civil Liberties Union's ("ACLU") brief, like Elder's brief, criticizes the panel's reliance upon *Davis*. Unlike Elder, the ACLU acknowledges in qualified immunity cases that " . . . Plaintiff may prevail only if he convinces the court that his claim is well-grounded in law," (p. 5) " . . . The plaintiff also must 'show' that . . . [plaintiff's] . . . constitutional rights were clearly established," (p. 12) and " . . . Plaintiff may prevail only if he establishes that his claim is well-grounded in law." (p. 13). Thus, while ACLU disagrees with the panel's reliance on *Davis*, it acknowledges in the context of qualified immunity that the plaintiff must make a showing. The American Bar Association does not address qualified immunity. None of the briefs provide the Court with any authority that the burden should not be on the plaintiff.

[10] *Oates v. Sobolevitch*, 914 F.2d 428 (3d Cir. 1990). *Oates* relied upon *Gomez v. Toledo*, 446 U.S. 635 (1980) to hold that defendant had the burden to prove entitlement to qualified immunity. The Third Circuit's reliance upon *Gomez* is misplaced. *Gomez* held the burden of pleading qualified immunity is on the defendant, but it did not address burden of proof. *Id.* at 642 (Rehnquist, J., concurring); *Harlow v. Fitzgerald, supra*, at 815 n.24.

the Courts of Appeals have placed the burden of establishing the violation of a clear constitutional right upon the plaintiff.[11] Further, placing the burden on plaintiff to show violation of a clearly established right is consistent with this Court's qualified immunity decisions and the policies underlying qualified immunity and summary judgment.

A number of the Court's decisions have addressed the burden in qualified immunity cases. Those decisions place the burden squarely on the plaintiff. For instance, Chief Justice Rehnquist, writing for the majority in *Siegert*, noted that Siegert both failed to *allege* the violation of a clearly established right, and " . . . failed to *establish* the violation of any constitutional right at all." *Id.*, 114 L.Ed.2d at 287 (emphasis added). Similarly, in *Malley v. Briggs, supra*, Justice Powell, in concurring and dissenting, wrote that summary judgment was appropriate because ". . . respondents failed to show . . ." that the decision to request a warrant was not objectively reasonable. In addition, in *Procunier, supra*, at 564, the Court

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[11] *Quintero de Quintero v. Aponte-Roque*, 974 F.2d 226 (1st Cir. 1992); *Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992); *Pounds v. Griepenstroh*, 970 F.2d 338 (7th Cir. 1992); *Cross v. City of Des Moines*, 965 F.2d 629 (8th Cir. 1992); *Easton v. Sundram*, 947 F.2d 1011 (2d Cir. 1991); *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (5th Cir. 1991); *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991); *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *affirmed on other grounds*, 114 L.Ed.2d 277 (1991); *Lopez v. Robinson*, 914 F.2d 486 (4th Cir. 1990); and *Nicholson v. Georgia Department of Human Resources*, 918 F.2d 145 (11th Cir. 1990).

specifically cited the cases offered by plaintiff and concluded that the cases did not establish a clear constitutional right.

In *Davis v. Scherer, supra,* the Court very plainly places the burden of showing clearly established law on the plaintiff. Three times in *Davis,* Justice Powell, writing for the majority, stated that the plaintiff had the burden to demonstrate a violation of his clearly established rights: "We conclude that the district court correctly held that *appellee has demonstrated no violation* of his clearly established constitutional rights," *Id.* at 193 (emphasis added); "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages *unless it is further demonstrated* that their conduct was unreasonable . . . ," *Id.* at 190 (emphasis added); and "A plaintiff who seeks damages for violation of constitutional or statutory rights *may overcome* the defendant official's qualified immunity *only by showing* that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). With those statements from Justice Powell, it is difficult to comprehend, notwithstanding Judge Kozinski's dissent[12] (JA 584-587),

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[12] Judge Kozinski criticizes the panel's reliance on *Davis* on four grounds. Each of the criticisms can easily be addressed. First, he states that the panel should not have relied on language in *Davis* which came from one paragraph " . . . dangling at the end of . . . [the decision]." JA 51. As noted above, Justice Powell stated three times in the decision that the burden was on plaintiff. Second, Judge Kozinski states that if the Court had intended to make a drastic change in qualified immunity law it would have used clearer language. JA 51. The language speaks for itself – it is very clear that Justice Powell was requiring the plaintiff to make a showing of why he thought he was entitled to

how *Davis* could not be construed as placing the burden upon plaintiff.

Moreover, as qualified immunity has evolved in the Court, there is only one way to demonstrate clearly established rights: Point to "legal rules" that were clearly established at the time the conduct occurred. *Anderson, supra,* at 639. Plaintiff must bear that burden because it is plaintiff that both asserts a violation of rights and under the qualified immunity standard asserts the law was clearly established such that a government official should

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sue. If the language in *Davis* was not clear to some, Justice Powell made it entirely clear two years later in *Malley* when he wrote that summary judgment should have been granted to government officials because plaintiff "failed to show" that the decision to request a warrant was not objectively reasonable. *Id.* at 347. Third, Judge Kozinski argues *Davis* could not mean what the panel concluded because no court perceived its meaning until the panel did. The argument ignores Ninth Circuit precedent which placed the burden on plaintiff as early as 1984, *Bothke v. Fluor Engineers & Constructors, Inc.,* 739 F.2d 484 (9th Cir. 1984); Amended Opinion, JA 36, and cases from all other Circuits except the Third. Fourth, Judge Kozinski asserts that the panel's reading of *Davis* is inconsistent with *Harlow.* JA 52-53. In fact, however, the panel's reading of *Davis* is entirely consistent with *Harlow. Harlow* held that the objective, legal inquiry in qualified immunity cases is whether the *law* was clearly established such that a government official should know his conduct violated plaintiff's rights. The court remanded the case to the district court to determine whether plaintiff's pretrial showings were sufficient to survive the government official's motion for summary judgment. *Id.* at 819-820. The only relevant pretrial showing after *Harlow* is the legal rules defining the contours of plaintiff's alleged constitutional right. *Anderson, supra,* at 639. Thus, Judge Kozinski's arguments regarding the panel's reliance on *Davis* are without foundation.

have known that he was violating the rights. It would be incongruous to place the burden on the defendant since the defendant generally denies that a right was violated. It would be inconsistent with American jurisprudence to allow a plaintiff to file a suit alleging violation of rights, but not to require plaintiff to show what rights.[13]

Placing the burden on a plaintiff to show clearly established law is not substantially different than placing the burden upon a plaintiff to establish the *prima facie* case under § 1983. Whether the question is viewed as plaintiff's duty to establish the first element of the *prima facie* case (deprivation of a constitutional right) or as plaintiff's duty to counter an affirmative defense (deprivation of a clearly established constitutional right), plaintiff must present a legal basis for his claim. That is the clear import of the Court's holding in *Siegert*: plaintiff must show that he has a basis for his claim.

That the Court has placed the burden of establishing clear constitutional rights on the plaintiff is best borne out in the context of pretrial motion practice. The Court has consistently held that motions to dismiss or motions

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[13] L. Carey, Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness, 38 *Vanderbilt Law Review* 1543, 1568-1570 (1985) (burden of proof on clearly established law should rest on the plaintiff). In addition, placing the burden on the court to show clearly established law would violate all principles of American jurisprudence. In our adversarial legal system, the court is a neutral arbiter of disputes. To place the burden upon the court would allow plaintiffs to file a complaint and hope the court could find legal authority to support the claim. The court's function would shift from neutral arbiter to advocate for the plaintiff.

for summary judgment are favored early in cases where qualified immunity is raised. *Hunter v. Bryant, supra,* 116 L.Ed.2d at 595. It is axiomatic that to successfully resist a pretrial motion, plaintiff must present some basis for his claim. In responding to a motion for summary judgment, " . . . plaintiffs may not play dog in the manger. . . . " *Butz v. Economou,* 438 U.S. 478, 508 (1978); *cf. Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).[14] If plaintiff cannot "play dog in the manger," and the sole inquiry is one of law, *Mitchell, supra,* at 528, there is only one thing the plaintiff must be charged with: present law – cases or statutes – which supports his claim that the rights allegedly violated were clearly established. Thus, the burden must be on the plaintiff.

Public policy underlying qualified immunity also supports placing the burden on plaintiff. In *Harlow* the Court recognized the deterrent effect of litigation on government officials and the inherent "social costs" of such litigation. *Harlow, supra,* at 814. To reduce the deterrence and social costs, the Court eliminated the subjective component of the qualified immunity standard to encourage resolution of qualified immunity issues in pretrial motions. *Id.* at 815-816. Similarly, placing the burden on plaintiff of showing clearly established law would aid in

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[14] "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to meet a showing sufficient to establish existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, supra,* at 322 (quoting *Anderson v. Liberty Lobby, supra*).

eliminating insubstantial lawsuits, encouraging citizen participation in government, and reducing social costs of litigation. Placing the burden upon plaintiff to establish entitlement to monetary damages would enhance the same goals as did elimination of the subjective component of qualified immunity. As Judge Learned Hand once stated in oft-quoted language:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave undressed the wrong done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .
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> *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)

Here, too, it is better to protect the innocent officer from the constant dread of retaliation. Logically, and consistent with the policies underlying qualified immunity, the burden of establishing clearly established rights should rest with the plaintiff.

III.

THE PANEL PROPERLY EXERCISED ITS DISCRETION IN DISREGARDING LEGAL AUTHORITIES NOT CITED TO THE DISTRICT COURT.

A.

The panel decision placed in context of the underlying record is a narrow one.

In addition to having addressed the burden of proof when qualified immunity is raised in civil rights actions,

the panel examined a court of appeals' role when plaintiff failed to meet the burden. The panel held under the circumstances of Elder's appeal that it would not consider a case which the panel located and which "arguably" may have affected the result. The panel's decision was within its discretion.

The panel's holding can best be understood in the context in which it arose. In the district court both Elder and Holloway moved for summary judgment. Elder sought partial summary judgment on the grounds that his arrest was unconstitutional. JA 4. Holloway sought summary judgment on two bases: (1) the arrest was constitutional and (2) qualified immunity. JA 5-10. One of the bases upon which Holloway sought summary judgment as to the constitutionality of the arrest was that it was justified by exigent circumstances. JA 6. The district court denied the cross motions on the constitutionality of the arrest on the basis that there were genuine issues of material fact, but it granted summary judgment on qualified immunity. JA 21.

On appeal to the Ninth Circuit, Elder, relying upon the same state law cases he relied upon in the district court, argued only the qualified immunity issue. At oral argument the panel raised the specter of *Al-Azzawy's* effect on the case. Elder's counsel attempted to distinguish *Al-Azzawy*. The reason is clear: *Al-Azzawy* is an exigent-circumstances case – it upheld a warrantless arrest under circumstances similar to this case. If Elder argued *Al-Azzawy* applied, he risked the panel affirming summary judgment to Holloway on the basis that Elder's arrest was justified by exigent circumstances. Rather than take that risk Elder sought to distinguish the case and

rely upon the cases cited to the district court. JA 35 n.1 and accompanying text.

The issue before the panel, then, was should it substitute its judgment for the judgment of an advocate. The panel was not willing to do so.

> Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when the plaintiff has the burden of addressing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours.
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> JA 44.

In the context in which the issue reached the panel, the panel's decision should come as no surprise. If error occurred, Elder invited it. JA 42. The panel certainly had discretion not to correct Elder's error whether the error was law or fact. JA 41 n.4 and accompanying text (providing numerous examples of instances where an appellate court exercises its discretion to not correct error); *cf. Kamen v. Kemper Financial Services*, 114 L.Ed.2d 152, 166 n.5 (1991) (the court has the discretion to deny a party the benefit of favorable legal authority).

The panel's decision specifically stated that the issue presented was a narrow one. JA 32. In defining the issue, the panel attempted to limit its holding to situations where " . . . plaintiff did not present [clearly established law] to the district court or to us on appeal. . . . " JA 32. It further noted that the language in *Al-Azzawy* which may have been helpful to Elder was dicta and that some aspects of the case were not at all helpful to Elder. JA 44.

Under the circumstances the district court's failure to find the case was not error, JA 44, and the panel would not substitute its judgment for that of an advocate. JA 44.

Thus, the panel decision is narrow. It exercised its discretion, in the face of invited error, and chose not to substitute its judgment for Elder's. The panel was within its discretion.

B.

Even if the panel decision is construed more broadly, it is a logical extension and reconciliation of this Court's qualified immunity cases and burden of proof.

The panel noted that while the burden of showing clearly established law had been placed on the plaintiff in the Ninth Circuit since 1984, there had been no discussions reconciling that burden with the concept that whether there was a clearly established right was a legal question. JA 36. The panel could not ignore either principle so it had to reconcile them. Consequently, it held when plaintiff was confronted by a motion for summary judgment on qualified immunity, plaintiff had to come forward with law to support that the law was clearly established. JA 36-37. Further, the panel had to reconcile its role when confronted with a party's failure to meet a burden, or a party's error, and its role in deciding legal questions. JA 40. In light of Elder's error, the panel declared its standard of review to be " . . . whether the district court erred in concluding that the plaintiff failed to meet its burden. . . . " JA 40.

The panel's conclusion is a logical extension of its role on evidentiary matters. Order and Dissents, JA 49

(Kozinski, J. dissenting) (courts of appeals have limited authority to review the factual record before it). Placing the burden upon the plaintiff to show clearly established law requires the plaintiff to come forward with some law when a defendant moves for summary judgment. See Part II of this brief. If plaintiff fails to establish a violation of clearly established rights at that time, placing the burden on the plaintiff is meaningless if the plaintiff can on appeal present additional authorities in support of his position. It would allow a plaintiff to "play dog in the manger," *Butz, supra*, at 508; it would prolong resolution of qualified immunity cases because plaintiff would not have to come forward immediately with a legal basis for his claim; and it would invite litigation against government officials.[15] Moreover, when *Harlow* declared that the inquiry in qualified immunity cases is an objective one intended to encourage early resolution of claims, when *Mitchell* declared that the inquiry in qualified immunity cases was an "essentially legal one" and when it is considered that all but one court of appeals have placed the burden of showing the clearly established right on the plaintiff – the panel's conclusion is entirely logical. Plaintiff must come forward with legal authorities to support his position that there was clearly established law.

Despite the logic of the panel decision, and perhaps because of it, Elder and the two *amicus curiae* which support him, devote virtually their entire briefs to this issue. Elder's principal criticism is that the panel decision

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[15] The panel identified other policy considerations supporting its decision, including the nature of the "clearly established law inquiry" and its precedential impact. JA 39-40.

limits an appellate court's authority to correct errors of law.[16] Elder, instead, advocates that an appellate court should have no discretion. He would require an appellate court to consider cases which the advocates did not cite and which the advocates chose to distinguish once brought to their attention. A court of appeals would no longer have discretion.[17] In that regard, Elder's position is more limiting of an appellate court's authority than is his interpretation of the panel decision because the court would no longer have discretion.

Elder's position is contrary to the inherent authority a court has to exercise discretion. This Court has consistently held that an appellate court has discretion, and is not duty bound, to consider (or to refuse to consider) matters before it. Most recently, in *United States National Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173 (1993) the Court held the court of appeals had discretion to consider an issue not raised by the parties. But, the Court declined to decide whether the court of appeals had a duty to decide the issue because " . . . the court's decision to consider the issue was certainly no abuse of its discretion." *Id.* at 2179. The flip side of the Court's pronouncement is, of course, that the court of appeals

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[16] Brief for Petitioner, p. 8; Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, p. 2; and Brief for the American Civil Liberties Union as Amicus Curiae in Support of Petitioner, p. 4. Since the arguments made in all three briefs are virtually identical, reference in the text of this brief is made only to Elder's brief.

[17] *See*, Brief for Petitioner, p. 14 (even a litigant's error should not deter an appellate court from its "duty" to determine the law) and, p. 16, (courts have "the duty" to consider legal authorities not cited).

had discretion to not consider the issue and was not bound to do so. *Cf. Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what question may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Courts of Appeals, to be exercised on the facts of individual cases. We announce no general rule.") Consequently, Elder's argument that the panel was duty bound to ignore Elder's error in the district court and at the court of appeals should be rejected.

C.

Supreme Court precedent supports deferential review of qualified immunity.

Further, to the extent the panel decision is read broadly to limit appellate review in all qualified immunity cases, it is not without precedent. Borrowing from Judge Kozinski, Elder refers to the panel decision as novel. Brief for Petitioner, p. 8. It is not. In *Pierce v. Underwood*, 487 U.S. 552 (1988) the Court limited appellate court review of a district court's decision of an essentially legal question.

The issue in *Pierce* was the right to attorneys' fees to successful litigants who challenged a decision by the Secretary of Housing and Urban Development ("HUD"). Under the applicable attorney fee statute, the litigants were entitled to fees " . . . unless the court finds that the position of the United States was substantially justified. . . . " 28 U.S.C. § 2412(d). The district court decided that HUD's decision had not been substantially justified. The Ninth Circuit affirmed that decision under an abuse

of discretion standard. This Court affirmed the court of appeals' decision to use the abuse of discretion standard.

The analysis employed by the Court in *Pierce* in determining that an abuse of discretion standard was appropriate is equally applicable to the qualified immunity issue. The Court looked at three factors to determine what standard of review was appropriate. First, the *Pierce* Court noted that the standard created by the attorney fee statute was whether "the *court* finds" HUD's position to be substantially justified, not whether "the position of the United States was substantially justified." It then concluded that the statute suggested "deference to the district court upon appeal." *Id.* at 559. Similarly, the inquiry in qualified immunity cases places the decision of whether there was clearly established law in the lap of "the *judge*."

> On summary judgment, *the judge* appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time the action occurred.
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> *Harlow v. Fitzgerald, supra*, at 818 (emphasis added).

Thus, the language of the statute in *Pierce* requiring the Court to make the decision of whether the government's action was substantially justified is similar to the judicial pronouncement in *Harlow* that the judge is to determine whether there is clearly established law.

Second, the *Pierce* Court considered that the standard of review to apply when there are mixed questions of law and fact often turns on what " . . . judicial actor is better positioned than another to decide the issue in question."

Id. at 559-560 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). That consideration supported an abuse of discretion standard of review because whether HUD's position was substantially justified " . . . will turn upon not merely *what was the law*, but what was the evidence regarding the facts." *Id.* at 560 (emphasis added). And, it did not matter, in the *Pierce* Court's analysis, that the district court's decision involved " . . . a judgment ultimately based upon evaluation of the *purely legal issue* governing the litigation." *Id.* at 560 (emphasis added).

The inquiry for qualified immunity is identical: an objective legal issue – whether the law was clearly established at the time of the conduct – is measured against the facts presented by the parties. *Anderson v. Creighton, supra*, at 641 ("The relevant question in the case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful. . . . ").

As a third, and final consideration, the *Pierce* Court discussed the difference between a decision on the merits of the claim against HUD from the attorney fee question. The attorney fee question looks to what the law was at the time of HUD's conduct. The merits are decided, on the other hand, by what the law is. *Id.* at 561. The import is that the attorney fee question when considered apart from the merits does not warrant *de novo* review for two reasons. First, because it does not " . . . produce the normal law – clarifying benefits that come from an appellate decision on a question of law. . . . " *Id.* at 561. That is so because it is not deciding what the current law is; rather, it is deciding a historical question of what the law was. Second, if the Court found that HUD's action was

not substantially justified, the law of the circuit on the merits would have been reached on an appeal of an attorney fee question. *Id.* at 561.

Again, the last of the three factors identified in *Pierce* supports an abuse of discretion standard of review for qualified immunity. An appeal of the qualified immunity issue apart from the merits does not produce "law clarifying benefits." All that is determined is whether the law was clearly established at the time of the conduct. It does not decide whether a constitutional right was in fact violated or what the current law is.[18] This Court so held in *Mitchell v. Forsyth, supra*, at 529 n.10:

> . . . the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the "merits" of the plaintiff's claim that the defendant's actions were in fact unlawful.

Further, on appeal of the qualified immunity issue, apart from the merits, an appellate court might find that the law was clearly established. Such a decision might be construed as deciding the merits of the constitutional question, just as a decision on attorney fees in *Pierce* might be construed as passing on the merits.

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[18] Elder flipflops on this issue. In Brief for Petitioner, p. 13 n.2, Elder acknowledges that an appellate court's decision on what the law was is not on the merits. On the contrary, Elder later argues that a decision on the qualified immunity issue is on the merits. *Id.* at 18 n.3. The latter argument is clearly wrong. For the latter position Elder cites *Mitchell v. Forsyth, supra*. Reliance on *Mitchell* is clearly misplaced. *See Mitchell, supra*, at 529 n.10.

The three reasons identified in *Pierce*, which led the Court to apply an abuse of discretion standard, all equally apply to the qualified immunity issue. The qualified immunity issue, like the issue in *Pierce*, involves " . . . multifarious, fleeting, special, narrow facts that utterly resist generalization. . . . " *Id.* at 561-562. Just as there is no need to employ a *de novo* review in determining what the law was in *Pierce*, there is no reason to employ *de novo* review to determine what the law was on the qualified immunity issue. Moreover, despite Elder's arguments to the contrary,[19] there is nothing about the qualified immunity inquiry being a "legal one," that specifically makes it subject to *de novo* review.[20] The *Pierce* court recognized that the issue before the court of appeals was a purely legal issue, as well. It was not the nature of the issue – legal or factual – alone that was determinative.

D.

Public policy considerations support deferential review of qualified immunity.

In addition to the factors identified in *Pierce* which justify an abuse of discretion standard, the public policy considerations underlying qualified immunity also support application of that standard of review. In *Harlow* the social cost of § 1983 litigation was the primary factor in eliminating the subjective component from the clearly established law issue. Once the district court makes a

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[19] Brief for Petitioner, p. 10.

[20] There are some who would dispute that the qualified immunity issue is a purely legal one after *Anderson v. Creighton, supra*. *See* S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8.08 (3d ed. 1986).

determination of the qualified immunity issue, *de novo* review prolongs the litigation. The present action demonstrates this point. Judged by an abuse of discretion standard, the panel had no difficulty in affirming summary judgment to Holloway. The social costs of the litigation would be over.

A second and related policy consideration – early resolution of the qualified immunity issue – is also promoted by an abuse of discretion standard. Under *Butz* plaintiff must bring forward whatever support he has for his claim when a motion for summary judgment is filed by defendant. Where there is a case which may both be helpful and harmful to a plaintiff's position, plaintiff may choose not to cite it in the district court with the hope that some other law will win the day. If plaintiff loses the qualified immunity issue, and a *de novo* standard of review is applied, plaintiff may then cite the authorities he was afraid to cite in the district court. Worse yet plaintiff may wait until he seeks *en banc* review to argue law which was purposefully and strategically not cited to the district court.

The abuse of discretion standard would make plaintiff come forward with whatever law was on point in the district court. If plaintiff did not, and summary judgment was granted to defendant, plaintiff would be precluded from raising the new law on appeal. The abuse of discretion standard would promote early resolution of the qualified immunity issue and would reduce the social costs of the litigation.

Elder's arguments notwithstanding, an abuse of discretion standard of review does not depart from the

objective standard enunciated in *Harlow*. It simply makes the plaintiff come forward at the earliest possible time to justify his claim. The objective standard is measured at the time plaintiff responds to the government official's pretrial motion. That is consistent with pretrial motion practice in the federal court. It is also consistent with an attorney's obligation under Rule 11 of the Federal Rules of Civil Procedure: "The signature of an attorney . . . constitutes a certificate by the signer that . . . the pleading . . . is warranted by existing law. . . . " The means for counsel to meet the Rule 11 obligation in qualified immunity cases is to locate cases which establish that the law was clearly established.[21]

In the final analysis, there is nothing unjust, and there is nothing unique, about making a litigant justify his position in litigation. "That such a rule may occasionally result in individual injustices has never been doubted, but at least until today, immunity has been accorded nevertheless." *Butz, supra*, at 520-521. In light of the social costs of civil rights litigation against government officials, requiring plaintiff to show clearly established law at the time plaintiff responds to a pretrial motion promotes the policies underlying qualified immunity. An abuse of discretion standard is, therefore, justified.

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[21] "The primary means open to a plaintiff to demonstrate the clarity of the law violated by a state official, and thus to overcome a qualified immunity defense, is the citation of past cases which have established a given rule or legal principle." Order and Dissents, JA 65 (Reinhardt, J. dissenting).

CONCLUSION

The Court of Appeals' Amended Opinion should be affirmed on the merits of the qualified immunity inquiry that a reasonable officer could have believed Elder's arrest to be lawful, in light of clearly established law and the information Holloway possessed. In the event the Court goes beyond the merits, it should affirm the Court of Appeals' decision to place the burden of proof upon the plaintiff to show clearly established law. Finally, the Court of Appeals' decision on the standard of review should be affirmed because the decision is a narrow one, within the Court's discretion and resulting from invited error. In the alternative, if the decision is interpreted more broadly, it is a logical extension of the burden of proof of clearly established law resting with the plaintiff, is supported by *Pierce*, and is justified by important policy considerations including those underlying qualified immunity.

DATED this 29th day of September, 1993.

Respectfully submitted,

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